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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CLARK PACIFIC, Plaintiff and Appellant, v. OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD, Defendant and Respondent; DEPARTMENT OF INDUSTRIAL RELATIONS, Real Party in Interest and Respondent.	C078953 (Super. Ct. No. 34201180000965CUWMGDS)

In denying Clark Pacific's petition for writ of mandamus, the trial court affirmed the Occupational Safety and Health Appeals Board's (Board) factual finding that an administrative assistant gave an inspector consent to inspect the industrial facility for safety violations. On appeal, Clark Pacific (petitioner) insists the evidence does not support the finding of consent. We disagree and affirm.

FACTS

On November 5, 2009, Dien Nguyen, an associate safety engineer for the Division of Occupational Safety and Health's (Cal/OSHA) High Hazard Unit, went into petitioner's office at its industrial facility in Fontana, California. She was greeted by Kimberly Drewry, who had been working for petitioner for 10 years and was the only person in the office. Nguyen asked to speak to the person in charge. Drewry stated that the plant manager, Thomas Thompson, was unavailable. Nguyen then asked Drewry if there was anyone else she could speak to, and Drewry responded she could speak to her.

Nguyen presented Drewry her Cal/OSHA credentials and explained that petitioner had been selected for a random programmed inspection. As a manufacturer of metal connectors to hold precast stone panels onto the structural steel of buildings, petitioner was involved in a high-hazard industry. The inspection was not triggered by a complaint or accident but was performed by the compliance unit and could have resulted in monetary penalties. Nguyen asked for Drewry's business card and what position she held. Drewry gave her Thompson's card, and Nguyen wrote the name "Kim" followed by the notation "admin."

Having explained the purpose of the visit and the Cal/OSHA program, Nguyen asked Drewry for consent to inspect the facility. Nguyen informed Drewry she had the right to refuse to give consent, but if she did, Nguyen would "go get a warrant and . . . come back anyway." Without hesitating, Drewry said "yes." Nguyen wrote on the inspection form that Drewry had consented. Nguyen further testified that customarily, if her authority is questioned during an inspection, she stops it. She has requested search warrants in cases in which she was unable to reach or identify a person with authority to grant consent. She did not call Thomas Thompson.

Nguyen told Drewry she, or another employee she designated, had the right to accompany her on the inspection. Drewry walked around with Nguyen but deferred to a lead man to answer Nguyen's questions when Drewry was unable to answer. Following

the inspection, Nguyen conducted an exit conference with Drewry, explaining the alleged violations she found and explaining the six-month time frame during which the violations could be corrected.

Drewry continued to correspond with Nguyen in the months following the inspection. She provided Nguyen requested documents and asked for an extension of time to provide other documents. On November 11, 2009, she sent Nguyen an e-mail stating: "I have mailed all of the documentation you requested on our inspection form. However, I am still waiting for permits from our corporate office for the air tanks. I must ask for an extension from you. Can I have until 11/20/09." No other employee corresponded with Cal/OSHA during the course of the inspection. Drewry attended the closing conference on January 12, 2010, with Thompson, but Drewry signed all of the declarations of service on behalf of petitioner indicating that petitioner had received the citations at issue here. Nguyen explained the appeal process, what the citations alleged, and how the proposed penalties are calculated.

Drewry's account of Nguyen's visit was similar, but with a few pertinent discrepancies petitioner insists undermine the findings of consent. According to Drewry, Nguyen did not inform her there was a possibility of receiving citations after the inspection. Drewry testified that "I explained to her, you know, I don't mind walking her through the shop as long as it's an unofficial, just let you know what would be wrong with your shop if we did come out, and that if she did find anything of concern, we would have six months to go ahead and work on fixing those, and at that time OSHA could come out or not come out." Simply put, Drewry did not believe the inspection was official or that citations would be issued as a result. Admittedly, she did not believe Nguyen needed to call Thompson about the inspection because "it wasn't an official OSHA inspection for citations."

The administrative appeal process took nearly two years. Petitioner claims that Nguyen's inspection of the facility violated its Fourth Amendment rights against

unreasonable searches because Nguyen failed to obtain free and voluntary consent for the inspection. The administrative law judge found petitioner had consented to the inspection and the Board denied the appeal, finding the inspection was valid because consent was freely and voluntarily given. In its "Denial of Petition for Reconsideration," the Board found that "[t]he evidence establishes the consent given [by Ms. Drewry] was voluntary, otherwise authorized, and appropriately obtained. [Citations.]" Petitioner filed a petition for writ of mandamus, and the trial court issued its ruling on the submitted matter three years later. The court made some pertinent factual findings in addition to the facts described above.

The court explained: "Nguyen never asked Drewry if she had authority to consent. Nguyen assumed Drewry had the authority because she was in 'admin,' because she was left 'in charge' of the office, because Drewry identified herself as the person Nguyen should speak to about the inspection. Likewise, Drewry never told Nguyen that she lacked authority to consent, and Drewry never called Thompson or told Nguyen to call Thompson to discuss the inspection request. [¶] . . . [¶]

"Drewry admits that she consented to the inspection. However, she claims she did so because she did not believe the inspection could result in citations. She testified that she understood the purpose of the inspection was to identify *potential* violations that could give rise to a monetary penalty if not corrected within six months. Drewry testified that she does not have authority to consent to inspections 'of a serious nature.' "

Taking an unusual approach in its opening brief, petitioner fails to cite a single case. In reply, it offers just one—a case that does not involve a safety inspection but, rather, consent while driving on a California highway and has been superseded by grant of review by the California Supreme Court. (*People v. Arredondo* (2016) 245 Cal.App.4th 186, review granted on specified issues June 8, 2016, S233582.) While petitioner provides us with a statutory framework within which Cal/OSHA issues citations and civil penalties for alleged violations of safety standards (Lab. Code, §§

6317, 6319), it ignores the limited scope of appellate review. Yet by failing to provide any applicable judicial precedent, it appears to recognize the inherently factual nature of the dispute. Indeed, the essence of petitioner's argument is that a mere secretary, even if left alone to administer the office, did not have authority to give consent to the inspection and did not give consent because she believed no citations would be issued as a result of a programmatic inspection. Petitioner's arguments are contrary to the findings made by the Board and the trial court in denying the petition for a writ of mandate.

DISCUSSION

We begin, as we must, with the standard of review.

Labor Code section 6629 limits judicial review of the Board's decision.[1] Like the trial court, we must review the entire record to determine whether the Board's decision is supported by substantial evidence. (*Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1033.) We may not reweigh the evidence when applying the substantial evidence standard; rather, we must consider evidence in the light most favorable to the administrative agency, giving it every reasonable inference and resolving all conflicts so as to support the agency's findings. (*Teichert Construction v. California Occupational Safety & Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 887-888.) Indeed, "we must presume the agency's findings and actions are supported by substantial evidence and the burden is on the appellant to show there is no substantial evidence whatsoever to support the Board's decision." (*Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 701.)

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[1] Cal/OSHA points us to Labor Code section 6630, which provides: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review." We need not resolve any conflict between Labor Code sections 6629 and 6630 because, as Cal/OSHA suggests, the Board's determinations were well supported by substantial evidence in the administrative record.

Petitioner contends the record does not support the factual findings. Specifically, petitioner argues Cal/OSHA did not offer any evidence to confirm Drewry had authority to consent or that she had been left in charge of the office. Petitioner asserts the evidence that Drewry corresponded with Cal/OSHA, attended the closing conference, and signed for receipt of the citations is irrelevant because these events happened after the consent should have been obtained. In petitioner's view, there was evidence that any consent she may have given was not given freely and voluntarily but, rather, under threat the inspector would obtain a warrant if she refused.

As pointed out above, petitioner simply ignores familiar principles derived from the substantial evidence rule. Petitioner seems resistant to the notion of circumstantial evidence and the duty we have to defer to reasonable inferences the Board drew. However, Petitioner, not Cal/OSHA, bears the burden of demonstrating no substantial evidence. More importantly, we must draw all reasonable inferences in favor of the Board's findings.

As a consequence, Cal/OSHA did not have the burden of producing direct evidence of Drewry's authority. She was the only representative physically present in the office responsible for interacting with the public, she identified herself as "admin," and when asked by the inspector who she should talk to about the pending inspection, Drewry responded that the inspector should talk to her. Moreover, Drewry testified she did not think the inspector needed to call the plant manager. She admitted she gave Nguyen consent to inspect and did not mind walking with her through the facility. The Board and trial court reasonably inferred that the sole person left to manage the office, who assured the inspector she could talk to her and who accompanied her on the inspection, had either the actual or apparent authority to consent to the inspection. We reject petitioner's argument to the contrary.

Moreover, we reject petitioner's denigration of Drewry's authority by labeling her a mere "secretary." In evaluating consent, the fact finder must take into account the

totality of the circumstances. Many secretaries, particularly if denoted as "admin," possess considerable authority to manage essential operations of a business. A secretary's authority is as variable as the competency of his or her bosses. But infused in the briefing is the misguided notion that the mere fact Drewry, a 10-year veteran at the business, was called a secretary meant she would not have had the authority to consent to the inspection.

Nor can we accept petitioner's argument that any evidence suggesting that Drewry possessed considerable authority and, in fact, was integral to the maintenance of safety at the facility by communicating with Cal/OSHA and attending the closing conference is irrelevant because it occurred after the consent had been given. The evidence of Drewry's ongoing participation in providing Cal/OSHA documentation and attending the conference bolster the inference she wielded sufficient authority to consent to the investigation. It is not that the authority to consent was retroactively given but, rather, that her behavior after the inspection was consistent with the inspector's perception that she could and did consent to the investigation.

Petitioner argues that Drewry had authority to consent to a "consultation-type" walk-through inspection but did not have the authority to consent to an investigation that might result in a fine. Nguyen testified, however, that she explained to Drewry the inspection was to determine if there were any safety violations, and if so, those violations could result in monetary penalties. To the extent there are factual disputes in the record, we must resolve such disputes in the light most favorable to the trier of fact. (*People v. Tully* (2012) 54 Cal.4th 952, 983-984.) To the extent Drewry misunderstood the purpose of the inspection, her good-faith misunderstanding does not vitiate the consent she gave to Nguyen. (*People v. Hale* (1968) 262 Cal.App.2d 780, 787.)

It is true the trial court found the inspector's explanation misleading that if consent was denied, she would simply obtain a warrant and return to complete the investigation. The court expressed doubt the warrant would have issued as easily as the inspector

suggested. But the court's hesitancy does not detract from the factual finding that whatever off-hand reference the inspector made about obtaining a warrant did not appear to rattle Drewry and certainly did not vitiate her consent. Courts have upheld a finding of consent despite overt threats to obtain a warrant; such a "threat" simply amounts to a declaration of the officers' legal remedies. (*People v. Ratliff* (1986) 41 Cal.3d 675, 687.)

This appeal is a simple challenge to the Board's factual finding that Drewry consented to the inspection of petitioner's facility and therefore the inspection did not constitute an unreasonable search of the premises in violation of the Fourth Amendment. The Board drew the imminently reasonable inference that the employee who greeted the inspector, told her she could talk to her about the inspection, guided her on the walk-through, corresponded with her about additional documentation, attended the closing conference, and signed for service of the citations had been accorded sufficient authority by petitioner to consent to the investigation, a consent she conceded she had given. Because there is ample evidence under the totality of the circumstances to support the trial court's affirmance of the Board's finding, we too must affirm.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

HOCH, J.